

FILED

2009 JUL 10 PM 3:14

CERT. U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
LOS ANGELES

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8  
9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

CV09-04974

GW FMOX

CASE NO.

COMPLAINT FOR INJUNCTIVE  
RELIEF

[Freedom of Information Act,  
5 U.S.C. §§ 552 *et seq.*]

11  
12 Byron J. Gross, an individual; and  
13 Hooper, Lundy & Bookman, Inc., a  
California corporation,

14 Plaintiffs,

15 vs.

16 Centers for Medicare and Medicaid  
17 Services, United States Department of  
Health and Human Services,

18 Defendant.

HOOPER, LUNDY & BOOKMAN, INC.  
1875 CENTURY PARK EAST, SUITE 1600  
LOS ANGELES, CALIFORNIA 90067-2517  
TEL: (310) 551-8111 • FAX: (310) 551-8181

COMPLAINT FOR INJUNCTIVE RELIEF

**COMPLAINT FOR INJUNCTIVE RELIEF**

1. This action arises out of Defendant Centers for Medicare and Medicaid Services's abysmal failure to comply with the statutory deadlines expressly set forth in the Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552 *et seq.* Plaintiffs Byron J. Gross and Hooper, Lundy & Bookman, Inc. seek injunctive and other appropriate relief to compel the Defendant to release one singular memorandum and certain hospital records, both of which the Plaintiff requested well over four months ago.

**JURISDICTION AND VENUE**

2. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

3. This Court is the proper venue to bring this action pursuant to 5 U.S.C. § 552(a)(4)(B). Specifically, the Plaintiffs' principal place of business is located within this Court's district.

**PARTIES**

4. Plaintiff Byron J. Gross is an individual whose principal place of business is located at 1875 Century Park East, Suite 1600, Los Angeles, California 90067. He is an attorney for Hooper, Lundy & Bookman, Inc. He signed and submitted the FOIA requests at issue in this action in his capacity as an attorney for Hooper, Lundy & Bookman, Inc.

5. Plaintiff Hooper, Lundy & Bookman, Inc. is a law firm incorporated and existing under the laws of the State of California, with its principal place of business located at 1875 Century Park East, Suite 1600, Los Angeles, California 90067. Plaintiffs Byron J. Gross and Hooper, Lundy & Bookman are referred collectively as "Plaintiffs" in this Complaint.

6. Defendant Centers for Medicare and Medicaid Services ("CMS") is a federal agency, as defined in 5 U.S.C. § 552(f)(1). Its headquarters is located at

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1 7500 Security Boulevard, Baltimore, Maryland 21244. CMS is a division within the  
2 United States Department of Health and Human Services.

### 3 PLAINTIFFS' WAGE INDEX CASES

4 7. The Medicare program pays hospitals for the services they render to  
5 Medicare patients based on prospectively set rates. *See generally* 42 U.S.C.  
6 § 1395ww. Under federal law, these payment rates must be adjusted to account for  
7 geographic differences in hospital wage levels, as they are compared to the national  
8 average hospital wage level. This adjustment is known as the wage index. *See* 42  
9 U.S.C. § 1395ww(d)(2)(H) (2009).

10 8. One factor that is used to calculate a hospital's average wage level is its  
11 pension and post-retirement costs. Fiscal intermediaries are responsible for  
12 conducting audits of hospital wage data, including pension and post-retirement data,  
13 to help determine each year's wage index. *See* 42 C.F.R. § 413.24 (2005).

14 9. On behalf of a number of hospitals, Plaintiffs filed an administrative  
15 appeal with the Provider Reimbursement Review Board ("PRRB" or "Board"), the  
16 administrative body that adjudicates Medicare reimbursement appeals, to contest the  
17 calculation of the wage index for federal fiscal year 2007. *See generally* 42 U.S.C.  
18 § 1395oo. Plaintiffs contend that CMS's improper computation of hospital pension  
19 and post-retirement data negatively affected the wage index for the area where their  
20 client hospitals are located.

21 10. Plaintiffs are required to file a preliminary position paper with the  
22 PRRB in connection with these appeals on or before October 1, 2009.

### 23 PLAINTIFFS' FOIA REQUEST FOR THE JOINT SIGNATURE 24 MEMORANDUM

25 11. In 2008, Plaintiffs learned that a document issued by CMS on January  
26 25, 2007 to fiscal intermediaries, known as a "Joint Signature Memorandum"  
27 ("JSM"), could be relevant to its wage index appeals.

28 12. By letter dated December 16, 2008, Plaintiffs submitted a FOIA request

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1 to CMS to request this JSM. The request was signed by Mr. Gross. *See* Exhibit  
2 (“Exh.”) 1 to this Complaint.

3 13. By letter dated March 31, 2009, Michael S. Marquis, Director of the  
4 Freedom of Information Group in CMS’s Baltimore headquarters, stated that  
5 documents responsive to Plaintiffs’ FOIA request (if they exist) “appear to be of the  
6 type that can be directly released to you” and that the request would be forwarded to  
7 a component within CMS, the Center for Medicare Management (“CMM”), for  
8 processing. Mr. Marquis further stated that another CMS representative, Jonnice  
9 McQuay, would be available to answer Plaintiffs’ questions or concerns. The FOIA  
10 request was assigned case number C09FOI0775. *See* Exh. 2.

11 14. On April 30, 2009, Plaintiffs were informed via voicemail that CMM  
12 could not fulfill the request, and that the request would be returned back to CMS’s  
13 Freedom of Information Group.

14 15. From May 1, 2009 to the present, Plaintiffs have made numerous phone  
15 and email inquiries to determine the status of their request and to obtain the  
16 document. These inquiries have been met only with silence.

17 16. The FOIA statute expressly provides that an agency like CMS has  
18 twenty (20) business days to decide whether to comply with, or deny, a request  
19 made pursuant to the FOIA statute. 5 U.S.C. § 552(a)(6)(A)(i). A party is “deemed  
20 to have exhausted his administrative remedies” with respect to a FOIA request “if  
21 the agency fails to comply with the applicable time limit provisions” of the statute.  
22 5 U.S.C. § 552(a)(6)(C)(i).

23 17. Over 140 business days have passed since Plaintiffs’ December 16,  
24 2008 request. The JSM still has not yet been released.

25 18. CMS has violated the applicable statutory time period for processing  
26 this FOIA request and has failed to promptly release the JSM to Plaintiffs.  
27 Accordingly, CMS is wrongfully withholding this document from Plaintiffs.  
28

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**PLAINTIFFS' FOIA REQUEST FOR HOSPITAL DATA**

19. In connection with its outstanding wage index appeals, Plaintiffs served a discovery request upon Wisconsin Physicians Service ("WPS"), the fiscal intermediary that audited hospital data during the time period relevant on appeal, on February 1, 2008. *See* Exh. 3. This request was served pursuant to the discovery guidelines set forth by the PRRB. Plaintiffs requested documents relating to hospital pension data audited by WPS. This request was clarified in a letter dated May 1, 2008. *See* Exh. 4.

20. Over the next year, the parties cooperated to refine the scope of the discovery request. By letter dated January 16, 2009, Plaintiffs voluntarily narrowed the scope of their discovery request and asked WPS to produce hospital pension audit records pertaining to only 12 hospitals that it audited during the relevant time period on appeal. *See* Exh. 5

21. By letter dated February 11, 2009, Stacey Hayes, a Specialist of Cost Report Appeals at WPS, informed Plaintiffs that this request could only be considered if it was submitted pursuant to FOIA. While Plaintiffs did not agree that this discovery could only be obtained under FOIA, it nonetheless complied with WPS's instructions in an effort to resolve the discovery issue as expeditiously and amicably as possible. *See* Exh. 6. Accordingly, by letter dated February 13, 2009, Plaintiffs re-submitted their letter as a formal FOIA request. *See* Exh. 7.

22. After receiving Plaintiffs' FOIA request, Mindy Chesnut, a Supervisor of Cost Report Audits at WPS, stated that WPS did not have any responsive documents and thus denied the request by letter dated March 4, 2009.<sup>1</sup> *See* Exh. 8. This response was surprising since WPS is the intermediary for the 12 hospitals

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<sup>1</sup> Although the letter is dated March 4, 2008, that is clearly a typo and was actually sent in March 2009.



1 selected in a mutually agreed upon narrowing process.

2 23. Plaintiffs conferred once again with the WPS intermediary. Based on  
3 those conversations, Plaintiffs submitted another FOIA request for certain  
4 workpapers for the same 12 hospitals, including workpaper forms known as "CMS  
5 339s" by letter dated March 18, 2009. Mr. Gross signed this request. *See* Exh. 9.

6 24. By letter dated April 3, 2009, Ms. Chesnut at WPS notified Plaintiffs  
7 that these workpapers were not within WPS's authority to release. WPS then routed  
8 the request from its Madison, Wisconsin office to Anita Groves, the FOIA  
9 Coordinator at the CMS regional office in Kansas City. The request was assigned  
10 case number 7922800288. *See* Exh. 10.

11 25. By letter dated six days later, on April 9, 2009, Ms. Groves in the  
12 Kansas City office stated that these workpapers were not within her authority to  
13 release. She forwarded the request to Michael S. Marquis, the Director of the  
14 Freedom Information Group in CMS's Baltimore, Maryland office. *See* Exh. 11.

15 26. From May 1, 2009 to the present, Plaintiffs have made numerous phone  
16 and email inquiries to determine the status of its request. These inquiries have been  
17 met only with silence.

18 27. To date, Plaintiffs' request has been forwarded to at least 3 different  
19 CMS offices covering at least 3 different jurisdictions across the country: from WPS  
20 in Wisconsin to Ms. Groves in Missouri to Mr. Marquis in Maryland. To date, CMS  
21 has not released any of the workpapers. To date, over 100 business days have  
22 passed since Plaintiffs' February 13, 2009 initial request, and it has been over 55  
23 business days since the Plaintiffs' similar follow-up March 18, 2009 request.

24 28. CMS has violated the applicable statutory time period for processing  
25 this FOIA request, and CMS is wrongfully withholding these documents from  
26 Plaintiffs.

27

28

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**CAUSE OF ACTION**

**Violation of the Freedom of Information Act for Wrongful Withholding of Agency Records**

29. Plaintiffs incorporate the above allegations as if set forth fully herein.

30. CMS has wrongfully withheld agency records requested by Plaintiffs by failing to comply with the statutory time limit for processing such requests.

31. Plaintiffs have exhausted the applicable administrative remedies with respect to CMS's failure to timely respond to its two FOIA requests.

32. Plaintiffs thus are entitled to injunctive relief with respect to the release and disclosure of the records it requested.

**REQUEST FOR RELIEF**

**WHEREFORE**, Plaintiffs pray that this Court:

1. Order Defendant CMS to complete its processing of Plaintiffs' two FOIA records requests immediately;

2. Order Defendant CMS to release the requested records to Plaintiffs upon completion of any such processing;

3. Provide for expeditious proceedings in this action to prevent further prejudice to Plaintiffs' administrative cases currently pending with the Board;

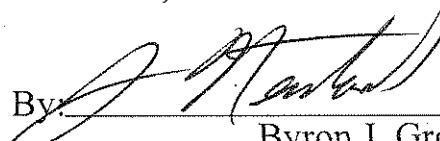
4. Award Plaintiffs their costs and reasonable attorneys fees incurred in this action; and

5. Grant such other relief that this Court may deem just and proper.

DATED: July 10, 2009

Respectfully submitted,

BYRON J. GROSS  
JON P. NEUSTADTER  
TIEN D. NGUYEN  
HOOPER, LUNDY & BOOKMAN, INC.

By:  For:  
Byron J. Gross  
Attorneys for Plaintiffs

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CARY W. MILLER  
STEPHEN F. TREADGOLD  
MARK A. JOHNSON  
STEPHEN K. PHILLIPS  
HOPE R. LEVY-BIEHL  
JODI P. BERLIN  
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DAVID M. LOGAN

# HOOPER, LUNDY & BOOKMAN, LLP

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PAUL A. DEERINGER  
JONATHAN W. RADKE

OFFICES ALSO LOCATED IN  
SAN DIEGO  
SAN FRANCISCO

**Certified Article Number**

7160 3901 9845 3950 3663

**SENDERS RECORD**

VIA CERTIFIED, RETURN RECEIPT

December 16, 2008

WRITER'S DIRECT DIAL NUMBER:  
(310) 551-8125

WRITER'S E-MAIL ADDRESS:  
BGROSS@HEALTH-LAW.COM

FILE NO. 91075-901

Centers for Medicare & Medicaid Services  
Office of Strategic Operations and Regulatory  
Affairs  
Freedom of Information Group  
Room N2-20-16  
7500 Security Boulevard  
Baltimore, Maryland 21244-1850

Centers for Medicare & Medicaid Services  
Region 9  
90 7th Street  
Suite 5-300 (5W)  
San Francisco, CA 94103

Re: Freedom of Information Act Request

**Certified Article Number**

7160 3901 9845 3950 3670

**SENDERS RECORD**

To Whom it May Concern:

Pursuant to 5 United States Code ("U.S.C.") § 552(a), the Freedom of Information Act ("FOIA"), the relevant implementing regulations set forth at Title 42 of the Code of Federal Regulations ("C.F.R."), sections 401 *et seq.*, and Title 45 C.F.R. § 5.1 *et seq.* we hereby formally request that the Centers for Medicare and Medicaid Services send us the following information:

- The Joint Signature Memorandum/Technical Direction Letter issued on January 25, 2007 to Mutual of Omaha/Wisconsin Physician Services, as well as other fiscal intermediaries that pertains, at least in part, to the auditing of hospitals' wage index data.

We do not believe that any of the records described above fall within any of the specified exemptions from FOIA's statutory disclosure requirements. However, to the extent that you conclude that certain portions of the requested records are exempt from disclosure, you are required by law to release any portions that are left after the exempted material has been deleted from the data we are seeking.

EXHIBIT 1

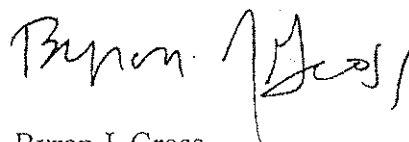


Centers for Medicare & Medicaid Services  
December 16, 2008  
Page 2

Finally, we note that you must respond to this request within 20 days pursuant to 5 U.S.C. § 552(a)(6)(A)(i).

Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Byron J. Gross", with a stylized flourish at the end.

Byron J. Gross

BJG/tn

DEPARTMENT OF HEALTH & HUMAN SERVICES  
Centers for Medicare & Medicaid Services  
7500 Security Boulevard, Mail Stop N2-20-16  
Baltimore, Maryland 21244-1850



Office of Strategic Operations and Regulatory Affairs/Freedom of Information Group

Byron Gross  
Hooper, Lundy & Bookman, Inc.  
Health Care Lawyers  
1875 Century Park East, Suite 1600  
Los Angeles, CA 90067

Dear Mr. Gross:

I am acknowledging receipt of your December 16, 2008 Freedom of Information Act (FOIA) request. Our initial review of your request indicates that the responsive documents, if they exist, appear to be of the type that can be directly released to you by the following Centers for Medicare & Medicaid Services component(s): Center for Medicare Management (CMM). Accordingly, we have referred your request to the cited office(s) for immediate processing. Questions concerning the status of your request can be directed to Jonnice McQuay at 410-786-9373.

The agency is authorized by law to collect fees for responding to FOIA requests and assumes that you are willing to pay the fees we charge for processing this request. If at anytime the costs for processing your request are estimated to exceed \$250.00, the cited office(s) will send you an invoice for the full estimated costs and suspend further processing until payment of the invoice amount is received. If estimated processing costs do not exceed \$250.00, the office(s) will send you an invoice for the applicable fee with their response.

Questions or concerns regarding this letter should be directed to: Desiree Gaynor at (410) 786-2691.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. S. Marquis'.

Michael S. Marquis  
Director  
Freedom of Information Group

(X-REF C09FOI0775)

**BEFORE THE  
PROVIDER REIMBURSEMENT REVIEW BOARD**

In the Matter of:

PRRB Case No. 07-2462G

CHS FFY 2007 WAGE INDEX (PENSION  
COST) GROUP

Provider Nos.: Various

Year Appealed: FFY 2007

**PROVIDERS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS  
PROPOUNDED UPON MUTUAL OF OMAHA/WISCONSIN PHYSICIANS SERVICE  
INSURANCE CORPORATION**

BYRON J. GROSS (State Bar No. 76626)  
JON P. NEUSTADTER (State Bar No. 172348)  
**HOOPER, LUNDY & BOOKMAN, INC.**  
1875 Century Park East, Suite 1600  
Los Angeles, California 90067-2517  
Telephone: (310) 551-8125  
Facsimile: (310) 551-8181

Attorneys for Providers

Pursuant to the Provider Reimbursement Review Board Instructions, Part II, Section A.II.c, the Providers bringing this appeal hereby request that Mutual of Omaha/Wisconsin Physicians Service Insurance Corporation respond to this Request for Production of Documents within 30 days by producing the requested documents to the offices of the Providers' counsel at 1875 Century Park East, Suite 1600, Los Angeles, California 90067.

### DEFINITIONS

- A. "CMS" refers to the Centers for Medicare and Medicaid Services.
- B. The words "communications" and "documents" should be construed broadly to include all documents and all types of written or electronic communications, including, but not limited to, correspondence, memoranda, and e-mail, as well as any written records of oral communications.
- C. The "wage data survey" refers to the review of wage and wage-related data reported by providers on Worksheet S-3 of their Medicare cost reports and then reviewed by the intermediaries each year for purposes of providing data to CMS that is used to establish the wage index used for Inpatient Prospective Payment System rates for each federal fiscal year.
- D. "You" refers to Mutual of Omaha/Wisconsin Physicians Service Insurance Corporation, any of its offices and any of its employees.

### REQUESTS FOR PRODUCTION

#### REQUEST FOR PRODUCTION NO. 1:

All written policies issued by CMS pertaining to the allowability of pension and/or post-retirement benefit costs as part of wage-related costs reported by hospitals for wage index

purposes, including, but not limited to, regulations, manual provisions, instructions, policy directives, transmittals, audit protocols, letters and FAQs.

**REQUEST FOR PRODUCTION NO. 2:**

All written communications between you and CMS pertaining to the criteria for allowability of pension and/or post-retirement benefit costs as part of wage-related costs reported by hospitals for wage index purposes.

**REQUEST FOR PRODUCTION NO. 3:**

All written communications between you and CMS pertaining to auditing pension and/or post-retirement benefit costs reported by hospitals as part of wage-related costs for wage index purposes.

**REQUEST FOR PRODUCTION NO. 4:**

All written communications internally within Mutual of Omaha/Wisconsin Physicians Service Insurance Corporation pertaining to the allowability of pension and/or post-retirement benefit costs reported by hospitals as part of wage-related costs for wage index purposes.

**REQUEST FOR PRODUCTION NO. 5:**

All written communications internally within Mutual of Omaha/Wisconsin Physicians Service Insurance Corporation pertaining to auditing pension and/or post-retirement benefit costs reported by hospitals as part of wage-related costs for wage index purposes.

**REQUEST FOR PRODUCTION NO. 6:**

For the wage data survey applicable to the wage index for Federal Fiscal Year 2007, all documents pertaining to adjustments made by Mutual of Omaha/Wisconsin Physicians Service Insurance Corporation to hospital wage data to remove or reduce pension or post-retirement



benefit costs, including, but not limited to, the adjustments, applicable workpapers, and correspondence with the hospital or CMS.

**REQUEST FOR PRODUCTION NO. 7:**

For the wage data survey applicable to the wage index for Federal Fiscal Year 2007, all documents pertaining to reviews by you of pension or post-retirement benefit costs which resulted in decisions not to make adjustments, including, but not limited to applicable workpapers and correspondence with the hospital or CMS.

**REQUEST FOR PRODUCTION NO. 8:**

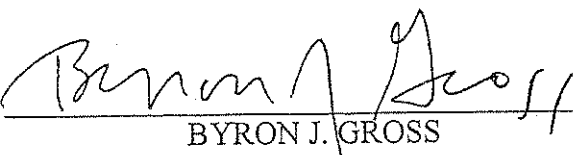
For the wage data survey applicable to the wage index for Federal Fiscal Year 2008, all documents pertaining to adjustments to hospital wage data to remove or reduce pension or post-retirement benefit costs, including, but not limited to, the adjustments, applicable workpapers, and correspondence with the hospital or CMS.

**REQUEST FOR PRODUCTION NO. 9:**

For the wage data survey applicable to the wage index for Federal Fiscal Year 2008, all documents pertaining to reviews by you of pension or post-retirement benefit costs which resulted in decisions not to make adjustments, including, but not limited to applicable workpapers and correspondence with the hospital or CMS

DATED: February 1, 2008

HOOPER, LUNDY & BOOKMAN, INC.

By:   
BYRON J. GROSS  
Attorneys for Providers

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1875 Century Park East, Suite 1600, Los Angeles, California 90067-2517.

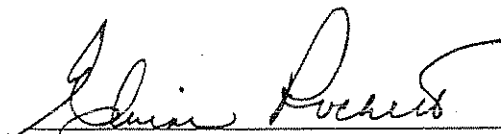
On February 1, 2008, I served the following document(s) described as **PROVIDERS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS PROPOUNDED UPON MUTUAL OF OMAHA/WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

Terry Gouger  
Wisconsin Physicians Service  
Insurance Corporation  
Medicare Audit  
P.O. Box 1604  
Omaha, NE 68101

**BY MAIL:** I am "readily familiar" with Hooper, Lundy & Bookman's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelope(s) were placed for collection and mailing with postage thereon fully prepaid at Los Angeles, California, on that same day following ordinary business practices.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on February 1, 2008, at Los Angeles, California.

  
Elaine Rockett

ROBERT W. LUNDY, JR.  
PATRIC HOOPER  
LLOYD A. BOOKMAN  
W. BRADLEY TULLY  
JOHN R. HELLOW  
LAURENCE D. GETZOFF  
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MARK A. JOHNSON  
STEPHEN K. PHILLIPS  
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FELICIA Y. SZE  
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MICHELLE R. HACKLEY  
KIM M. WOROBEC  
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JENNIFER A. HARTZELL  
NINA N. ADATIA  
ABIGAIL H. WONG  
SALVATORE J. ZIMMITTI  
JOSEPH R. LAMAGNA  
DAVID D. JOHNSON  
RICHARD KOVACIK  
KARL A. SCHMITZ  
JENNIFER A. GRAY  
GREG B. SHERMAN  
TIEN NGUYEN

WRITER'S DIRECT DIAL NUMBER:  
(310) 551-8125

WRITER'S E-MAIL ADDRESS:  
BGROSS@HEALTH-LAW.COM

FILE NO. 91075-901

May 1, 2008

VIA CERTIFIED MAIL – 71603901984934615787  
RETURN RECEIPT REQUESTED

Stacey Hayes  
Specialist Cost Report Appeals  
Medicare Audit  
Wisconsin Physicians Service  
P.O. Box 1787  
Madison, WI 53701

Re: CHS FFY 2007 Wage Index (Pension Costs) Group  
Federal Fiscal Year Ending 09/30/07  
Provider Nos. Various  
PRRB Case No. 07-2462G

Follow-Up Request for Discovery

Dear Ms. Hayes:

Thank you for your February 6, 2008 response to our Request for Production of Documents. This letter serves as a follow-up request to that response.

First, our original Request for Production Number 1 requested all written policies issued by the Centers for Medicare and Medicaid Services ("CMS") regarding the allowability of pension and/or post-retirement benefit costs reported by hospitals for wage index purposes. Your response stated that these policies are available via the CMS website or "other sources." Please specify exactly which "other sources" contain the CMS policies we are requesting.

Second, our original Request for Production Numbers 2 and 3 requested all external written communications between Wisconsin Physician Services/Mutual of Omaha ("WPS") and CMS pertaining to the allowability and auditing of pension and/or post-retirement benefit costs reported by hospitals for wage index purposes. Your response stated that communications between WPS and CMS include a privileged Joint Signature Memorandum issued on January 25,

EXHIBIT 4

HOOPER, LUNDY & BOOKMAN, INC.  
HEALTH CARE LAWYERS

Stacey Hayes  
May 1, 2008  
Page 2

2007. Please state the basis for your claim that the Joint Signature Memorandum is privileged. Additionally, please produce all non-privileged communications between WPS and CMS that are responsive to these requests.

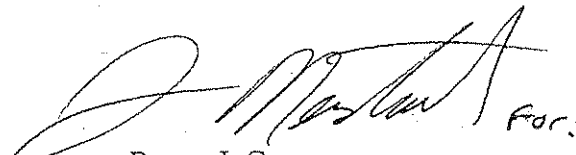
Third, our original Request for Production Numbers 4 and 5 requested all internal written communications within WPS pertaining to the allowability and auditing of pension and post-retirement benefit costs reported by hospitals as part of wage-related costs for wage index purposes. Your response stated that the requested internal communications include "proprietary and confidential" internal operating procedure and audit programs and were not produced because the release of such information "may jeopardize future audits." Please detail the basis for your claim that such information is "proprietary and confidential" and clarify why the production of such information "may jeopardize future audits." In addition, please produce all non-privileged internal communications that are responsive to these requests.

Finally, our original Request for Production Numbers 6, 7, 8 and 9 requested all documents related to adjustments made to, or reviews of, pension or post-retirement benefit costs that removed or reduced pension or post-retirement benefit costs for wage index purposes for federal fiscal years 2007 and 2008. We appreciate your production of the schedules that reflect adjustments made to the total wage related costs for Fallbrook District Hospital. Our request, however, was not limited to the hospitals participating in this group appeal. Rather, our request pertains to all hospitals for which WPS was responsible for auditing wage data for development of the wage index for FFYs 2007 and 2008. Thus, in addition to any other responsive documents, we request that schedules similar to those produced for Fallbrook District Hospital be produced for all hospitals for which WPS was the intermediary during the aforementioned time periods.

Pursuant to the Provider Reimbursement Review Board Instructions, Part II, Section A.II.c, you are required to respond to this second Request for Production of Documents in writing within 30 days.

Thank you very much.

Sincerely,

  
Byron J. Gross

BJG/tn

cc: Steven R. Kirsh, PRRB  
Lisa Parrish, CHS

EXHIBIT 4

16

ROBERT W. LUNDY, JR.  
PATRIC HOOPER  
LLOYD A. BOOKMAN  
W. BRADLEY TULLY  
JOHN R. HELLOW  
LAURENCE D. GETZOFF  
JAY N. HARTZ  
BYRON J. GROSS  
DAVID P. HENNINGER  
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GLENN E. SOLOMON  
CRAIG J. CANNIZZO  
SCOTT J. KIEPEN  
MARK S. HARDIMAN  
CARY W. MILLER  
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MARK A. JOHNSON  
STEPHEN K. PHILLIPS  
HOPE R. LEVY-BIEHL  
JODI P. BERLIN  
STACIE K. NERONI  
DAVID M. LOGAN  
BLAKE R. JONES

HOOPER, LUNDY & BOOKMAN, INC.

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TIEN NGUYEN  
PAUL A. DEERINGER  
JONATHAN W. RADKE  
TRACY A. JESSNER

OFFICES ALSO LOCATED IN  
SAN DIEGO  
SAN FRANCISCO

WRITER'S DIRECT DIAL NUMBER:  
(310) 551-8125

WRITER'S E-MAIL ADDRESS:  
BGROSS@HEALTH-LAW.COM

January 16, 2009

VIA E-MAIL & U.S. MAIL

Terry Gouger  
Supervisor, Cost Report Appeals  
Wisconsin Physicians Service  
Medicare Audit  
P.O. Box 1604  
Omaha, NE 68101

Re: Community Health Systems FFY 2007 Wage Index (Pension Costs)  
Group Appeal  
PRRB Case No. 07-2462G

*FOLLOW UP RE DISCOVERY REQUEST*

Dear Terry:

As you know, we previously submitted discovery requests for the above-referenced group appeal, requesting documentation on efforts made by Wisconsin Physician Services ("WPS") to audit the pension costs for the hospitals for which it is responsible as part of the wage index surveys for federal fiscal years 2007 and 2008. You had indicated to me that you believed that compliance with our requests would be extremely burdensome. To accommodate that concern, you and I discussed an alternative, which consisted of us selecting a small sample of providers for which the information sought would be provided.

We have come up with a list of 12 providers for which we would like to see information. This should not present great difficulties for you, so I hope that you will be able to comply with this within 30 days. While you should obviously use the discovery request as a guide for determining what documents should be produced, we are essentially looking for the wage index workpapers and documents obtained from the providers which will show whether and how the fiscal intermediary audited the providers' claimed pension costs when doing the wage index survey.

EXHIBIT 5

17



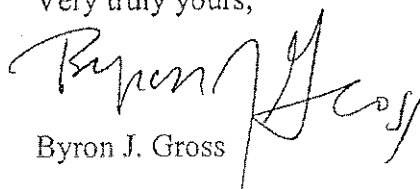
HEALTH CARE LAWYERS

Terry Gouger  
January 16, 2009  
Page 2

Please note that we are not waiving our right to compel full compliance with the original discovery requests, but we hope that, if this sampling process can be worked out, it will not be necessary. Please note that we have filed motions to compel against other intermediaries that have not responded to our requests. However, since you have indicated an intention to be cooperative, we want cooperate also and try to work this out in a way that will be less burdensome for WPS.

Please let me know if you have any questions. Thank you very much for your cooperation.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Byron J. Gross", is written over the typed name.

Byron J. Gross

BJG/er  
Enclosure

EXHIBIT 5

18

## LIST OF SAMPLE WPS HOSPITALS FOR WAGE INDEX CASES

| Prov No | Prov Name                             | City           | County        | State | CBSA                        |
|---------|---------------------------------------|----------------|---------------|-------|-----------------------------|
| 260068  | Boone Hospital Center                 | Columbia       | Boone         | MO    | Columbia, MO                |
| 450096  | Christus St. Mary Hospital            | Port Arthur    | Jefferson     | TX    | Beaumont-Port Arthur, TX    |
| 390111  | Hospital University of Pennsylvania   | Philadelphia   | Philadelphia  | PA    | Philadelphia, PA            |
| 160047  | Jennie Edmundson Hospital             | Council Bluffs | Pottawattamie | IA    | Omaha-Council Bluffs, NE-IA |
| 370093  | Oklahoma University Medical Center    | Oklahoma City  | Oklahoma      | OK    | Oklahoma City, OK           |
| 390223  | Presbyterian Medical Center           | Philadelphia   | Philadelphia  | PA    | Philadelphia, PA            |
| 280020  | St. Elizabeth Regional Medical Center | Lincoln        | Lancaster     | NE    | Lincoln, NE                 |
| 260138  | St. Luke's Hospital of Kansas City    | Kansas City    | Jackson       | MO    | Kansas City, MO-KS          |
| 260179  | St. Luke's Hospital                   | Chesterfield   | St. Louis     | MO    | St. Louis, MO-IL            |
| 260193  | St. Mary's Medical Center             | Blue Springs   | Jackson       | MO    | Kansas City, MO-KS          |
| 390174  | Thomas Jefferson University Hospital  | Philadelphia   | Philadelphia  | PA    | Philadelphia, PA            |
| 290007  | University Medical Center             | Las Vegas      | Clark         | NV    | Las Vegas-Paradise, NV      |

EXHIBIT 5

WPS Sample Hospitals (2) (2) XLS



## Medicare

February 11, 2009

Byron J. Gross  
Hooper, Lundy & Bookman, Inc.  
Health Care Lawyers  
1875 Century Park East  
Los Angeles, CA 90067-2517

RE: Group Name CHS FFY 2007 Wage Index Pension Cost  
PRRB Case Number 07-2462G

Dear Mr. Gross:

This is in response to your letter dated January 16, 2009. You have selected a sample of 12 providers for which you have requested wage index documents. This sample was to show whether and how Wisconsin Physicians Service (WPS) audited the providers' claimed pension costs when doing the wage index survey.

WPS contends this information must be obtained through use of the Freedom of Information (FOI) regulations especially since the 12 providers are not present in the group appeal. The regulation for the rules of disclosure is covered at 42 C.F.R. § 401.105. It states, "The Freedom of Information Act rules shall be applied to every proposed disclosure of information..." The manual reference at HIM 15-1 § 2950 covers the disclosure of information in the hearing process. It also references the FOI.

We have previously discussed and communicated the procedure for requesting information through a FOI request. The procedure to request such information from WPS may be found on our website at the following address:

[http://www.wpsmedicare.com/part\\_a/business/foi\\_act.shtml](http://www.wpsmedicare.com/part_a/business/foi_act.shtml)

Contact me at 866-734-9444, extension 6520, if you have questions or comments.

Sincerely,

Stacey Hayes  
Specialist Cost Report Appeals  
Medicare Audit  
Wisconsin Physicians Service



ROBERT W. LUNDY, JR.  
PATRIC HOOPER  
LLOYD A. BOOKMAN  
W. BRADLEY TULLY  
JOHN R. HELLOW  
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HOLPER, LUNDY & BOOKMAN, INC.

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SAN FRANCISCO

WRITER'S DIRECT DIAL NUMBER:  
(310) 551-8125

WRITER'S E-MAIL ADDRESS:  
BGROSS@HEALTH-LAW.COM

February 13, 2009

FILE NO. 91075-901

VIA FEDERAL EXPRESS

Stacey Hayes  
Specialist Cost Report Appeals  
Wisconsin Physicians Service  
Medicare Audit  
3333 Farnam Street  
Omaha, NE 68131

Terry Gouger  
Supervisor, Cost Report Appeals  
Wisconsin Physicians Service  
Medicare Audit  
3333 Farnam Street  
Omaha, NE 68131

Re: CHS 2007 Wage Index (Pension Cost) Group Appeal  
PRRB Case No. 07-2462G

FREEDOM OF INFORMATION ACT REQUEST

Dear Ms. Hayes and Mr. Gouger:

This letter serves as a Freedom of Information Act ("FOIA") request for documents on behalf of the above-listed providers (the "Providers") in the above group appeal.

As you aware, this group appeal pertains to the auditing of pension and post-retirement cost benefits for hospital fiscal years beginning during Federal Fiscal Years 2003 and 2004 for purposes of calculating the FFY 2007 and 2008 wage indices. The Providers contend, among other arguments, that fiscal intermediaries were not auditing these costs consistently throughout the country.

As part of its discovery on this issue, on February 1, 2008, the Providers served a Request for Production of Documents upon Wisconsin Physicians Services ("WPS"). See Exhibit ("Ex.") A. Because the Providers' request pertained to all hospitals for which Mutual of Omaha/WPS audited in 2003 and 2004, the Providers specifically requested pension audit data for all hospitals for which it served as a fiscal intermediary during the time. After discussions with Terry Gouger, in order to reduce any burden on WPS, the Providers agreed to narrow its request to a

EXHIBIT 7

HOOPER, LUNDY & BOOP, AN, INC.  
HEALTH CARE LAWYERS

February 13, 2009  
Page 2

sample of 12 hospitals (without waiving their right to pursue wider discovery at a later date). In accordance with the agreement as the Providers understood it, WPS was to produce relevant documents pertaining to these hospitals in accordance with the Providers' document production request. *See* Sample List of WPS Hospitals, Ex. B.

On January 29, 2009, WPS informed the Providers verbally that the information they are seeking in their appeal must be obtained pursuant to the Freedom of Information Act ("FOIA"), in part because the Providers are seeking information related to non-party hospitals. This was confirmed in a letter, dated February 11, 2009, which is attached hereto as Ex. C. The Providers note, however, that WPS, not the hospitals, is the relevant party in this appeal. In any case, the regulations clearly permit document requests to be served upon non-parties. *See* 42 C.F.R. § 405.1853(e)(2)(i) ("A party may request of another party, or of a nonparty .... the reasonable production of documents for inspection and copying.").

Nonetheless, in order to resolve this discovery issue as amicably as possible, the Providers now submit this FOIA request with the expectation that it will be answered well within the 20 days that the agency has to respond under the FOIA statute. *See* 5 U.S.C. § 552(a)(6)(A)(i).

Accordingly, pursuant to FOIA (5 U.S.C. § 552(a) and the relevant implementing regulations set forth at Title 42 of the Code of Federal Regulations ("C.F.R."), sections 401 *et seq.*, and Title 45 C.F.R. § 5.1 *et seq.*), the Providers hereby formally request that WPS send the following information in connection to all 12 of the hospitals listed in Exhibit B:

- For the wage data survey applicable to the wage indices for FFYs 2007 and 2008, all documents pertaining to adjustments made by Mutual of Omaha/WPS to each hospitals' wage data to reduce or remove pension or post-retirement benefit costs, including, but not limited to, the adjustments, applicable workpapers, and correspondence with the hospital or CMS; and
- For the wage data survey applicable to the wage indices for FFYs 2007 and 2008, all documents pertaining to reviews by Mutual of Omaha/WPS of pension or post-retirement benefit costs which resulted in decisions to make, or not make, adjustments to hospital pension cost data.

We are willing to pay fees for this request up to a maximum of \$250 without any further approval. If you estimate that the fees will exceed this amount, please notify us immediately.

Finally, please note that this FOIA request in no way waives the Providers' right to discovery in this appeal, including its right to compel answers to its February 1, 2008 document request.

EXHIBIT 7

22

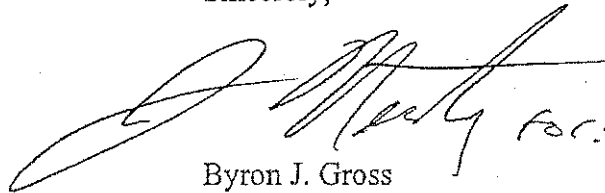


HOOPER, LUNDY & BOOKMAN, INC.  
HEALTH CARE LAWYERS

February 13, 2009  
Page 3

Thank you very much for your prompt attention to this matter. We look forward to working with you.

Sincerely,

A handwritten signature in black ink, appearing to read "Byron J. Gross", with a stylized flourish at the end.

Byron J. Gross

BJG/tn

Cc: Mindy Chesnut, Wisconsin Physician Services  
Lisa Parrish, Community Health Systems

EXHIBIT 7

23

# **EXHIBIT A**

BEFORE THE  
PROVIDER REIMBURSEMENT REVIEW BOARD

In the Matter of:

PRRB Case No. 07-2462G

CHS FFY 2007 WAGE INDEX (PENSION  
COST) GROUP

Provider Nos.: Various

Year Appealed: FFY 2007

PROVIDERS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS  
PROPOUNDED UPON MUTUAL OF OMAHA/WISCONSIN PHYSICIANS SERVICE  
INSURANCE CORPORATION

BYRON J. GROSS (State Bar No. 76626)  
JON P. NEUSTADTER (State Bar No. 172348)  
HOOPER, LUNDY & BOOKMAN, INC.  
1875 Century Park East, Suite 1600  
Los Angeles, California 90067-2517  
Telephone: (310) 551-8125  
Facsimile: (310) 551-8181

Attorneys for Providers

Pursuant to the Provider Reimbursement Review Board Instructions, Part II, Section A.II.c, the Providers bringing this appeal hereby request that Mutual of Omaha/Wisconsin Physicians Service Insurance Corporation respond to this Request for Production of Documents within 30 days by producing the requested documents to the offices of the Providers' counsel at 1875 Century Park East, Suite 1600, Los Angeles, California 90067.

### DEFINITIONS

- A. "CMS" refers to the Centers for Medicare and Medicaid Services.
- B. The words "communications" and "documents" should be construed broadly to include all documents and all types of written or electronic communications, including, but not limited to, correspondence, memoranda, and e-mail, as well as any written records of oral communications.
- C. The "wage data survey" refers to the review of wage and wage-related data reported by providers on Worksheet S-3 of their Medicare cost reports and then reviewed by the intermediaries each year for purposes of providing data to CMS that is used to establish the wage index used for Inpatient Prospective Payment System rates for each federal fiscal year.
- D. "You" refers to Mutual of Omaha/Wisconsin Physicians Service Insurance Corporation, any of its offices and any of its employees.

### REQUESTS FOR PRODUCTION

#### REQUEST FOR PRODUCTION NO. 1:

All written policies issued by CMS pertaining to the allowability of pension and/or post-retirement benefit costs as part of wage-related costs reported by hospitals for wage index

purposes, including, but not limited to, regulations, manual provisions, instructions, policy directives, transmittals, audit protocols, letters and FAQs.

**REQUEST FOR PRODUCTION NO. 2:**

All written communications between you and CMS pertaining to the criteria for allowability of pension and/or post-retirement benefit costs as part of wage-related costs reported by hospitals for wage index purposes.

**REQUEST FOR PRODUCTION NO. 3:**

All written communications between you and CMS pertaining to auditing pension and/or post-retirement benefit costs reported by hospitals as part of wage-related costs for wage index purposes.

**REQUEST FOR PRODUCTION NO. 4:**

All written communications internally within Mutual of Omaha/Wisconsin Physicians Service Insurance Corporation pertaining to the allowability of pension and/or post-retirement benefit costs reported by hospitals as part of wage-related costs for wage index purposes.

**REQUEST FOR PRODUCTION NO. 5:**

All written communications internally within Mutual of Omaha/Wisconsin Physicians Service Insurance Corporation pertaining to auditing pension and/or post-retirement benefit costs reported by hospitals as part of wage-related costs for wage index purposes.

**REQUEST FOR PRODUCTION NO. 6:**

For the wage data survey applicable to the wage index for Federal Fiscal Year 2007, all documents pertaining to adjustments made by Mutual of Omaha/Wisconsin Physicians Service Insurance Corporation to hospital wage data to remove or reduce pension or post-retirement



**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1875 Century Park East, Suite 1600, Los Angeles, California 90067-2517.

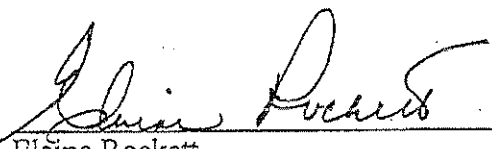
On February 1, 2008, I served the following document(s) described as **PROVIDERS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS PROPOUNDED UPON MUTUAL OF OMAHA/WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

Terry Gouger  
Wisconsin Physicians Service  
Insurance Corporation  
Medicare Audit  
P.O. Box 1604  
Omaha, NE 68101

**BY MAIL:** I am "readily familiar" with Hooper, Lundy & Bookman's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelope(s) were placed for collection and mailing with postage thereon fully prepaid at Los Angeles, California, on that same day following ordinary business practices.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on February 1, 2008, at Los Angeles, California.

  
Elaine Rockett

# **EXHIBIT B**

## LIST OF SAMPLE WPS HOSPITALS FOR WAGE INDEX CASES

| Prov No | Prov Name                             | City           | County        | State | CBSA                        |
|---------|---------------------------------------|----------------|---------------|-------|-----------------------------|
| 260068  | Boone Hospital Center                 | Columbia       | Boone         | MO    | Columbia, MO                |
| 450096  | Christus St. Mary Hospital            | Port Arthur    | Jefferson     | TX    | Beaumont-Port Arthur, TX    |
| 390111  | Hospital University of Pennsylvania   | Philadelphia   | Philadelphia  | PA    | Philadelphia, PA            |
| 160047  | Jennie Edmundson Hospital             | Council Bluffs | Pottawattamie | IA    | Omaha-Council Bluffs, NE-IA |
| 370093  | Oklahoma University Medical Center    | Oklahoma City  | Oklahoma      | OK    | Oklahoma City, OK           |
| 390223  | Presbyterian Medical Center           | Philadelphia   | Philadelphia  | PA    | Philadelphia, PA            |
| 280020  | St. Elizabeth Regional Medical Center | Lincoln        | Lancaster     | NE    | Lincoln, NE                 |
| 260138  | St. Luke's Hospital for Kansas City   | Kansas City    | Jackson       | MO    | Kansas City, MO-KS          |
| 260179  | St. Luke's Hospital                   | Chesterfield   | St. Louis     | MO    | St. Louis, MO-IL            |
| 260193  | St. Mary's Medical Center             | Blue Springs   | Jackson       | MO    | Kansas City, MO-KS          |
| 390174  | Thomas Jefferson University Hospital  | Philadelphia   | Philadelphia  | PA    | Philadelphia, PA            |
| 290007  | University Medical Center             | Las Vegas      | Clark         | NV    | Las Vegas-Paradise, NV      |

EXHIBIT 7

WPS Sample Hospitals (2) (2).XLS

# **EXHIBIT C**



# Medicare

February 11, 2009

Byron J. Gross  
Hooper, Lundy & Bookman, Inc.  
Health Care Lawyers  
1875 Century Park East  
Los Angeles, CA 90067-2517

RE: Group Name CHS FFY 2007 Wage Index Pension Cost  
PRRB Case Number 07-2462G

Dear Mr. Gross:

This is in response to your letter dated January 16, 2009. You have selected a sample of 12 providers for which you have requested wage index documents. This sample was to show whether and how Wisconsin Physicians Service (WPS) audited the providers' claimed pension costs when doing the wage index survey.

WPS contends this information must be obtained through use of the Freedom of Information (FOI) regulations especially since the 12 providers are not present in the group appeal. The regulation for the rules of disclosure is covered at 42 C.F.R. § 401.105. It states, "The Freedom of Information Act rules shall be applied to every proposed disclosure of information..." The manual reference at HIM 15-1 § 2950 covers the disclosure of information in the hearing process. It also references the FOI.

We have previously discussed and communicated the procedure for requesting information through a FOI request. The procedure to request such information from WPS may be found on our website at the following address:

[http://www.wpsmedicare.com/part\\_a/business/foi\\_act.shtml](http://www.wpsmedicare.com/part_a/business/foi_act.shtml)

Contact me at 866-734-9444, extension 6520, if you have questions or comments.

Sincerely,

Stacey Hayes  
Specialist Cost Report Appeals  
Medicare Audit  
Wisconsin Physicians Service



Wisconsin Physicians Service Insurance Corporation serving as a CMS Medicare Contractor  
P.O. Box 1787 • Madison, WI 53701 • Phone 608-221-4711

EXHIBIT 7

Jodee M. Jones

---

From: TrackingUpdates@fedex.com  
 Sent: Monday, February 16, 2009 7:11 AM  
 To: Jodee M. Jones  
 Subject: FedEx Shipment 796344029723 Delivered

---

This tracking update has been requested by:

Company Name: Hooper, Lundy & Bookman, Inc.  
 Name: Tien Nguyen  
 E-mail: jjones@health-law.com

---

Our records indicate that the following shipment has been delivered:

Reference: 88090-981  
 Ship (P/U) date: Feb 13, 2009  
 Delivery date: Feb 16, 2009 9:04 AM  
 Sign for by: E.WENDT  
 Delivered to: Receptionist/Front Desk  
 Service type: FedEx Priority Overnight  
 Packaging type: FedEx Envelope  
 Number of pieces: 1  
 Special handling/Services: Deliver Weekday

Tracking number: 796344029723

| Shipper Information                | Recipient Information          |
|------------------------------------|--------------------------------|
| Tien Nguyen                        | Stacey Hayes, Spec.-Cost Rpt   |
| Hooper, Lundy & Bookman, Inc.      | Appls                          |
| 1875 Century Park East; Suite 1600 | Wisconsin Physicians Service   |
| Los Angeles                        | 3333 FARNAM ST; MEDICARE AUDIT |
| CA                                 | OMAHA                          |
| US                                 | NE                             |
| 90067                              | US                             |
|                                    | 68131                          |

Please do not respond to this message. This email was sent from an unattended mailbox. This report was generated at approximately 9:11 AM CST on 02/16/2009.

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All weights are estimated.

To track the latest status of your shipment, click on the tracking number above, or visit us at [fedex.com](http://fedex.com).

This tracking update has been sent to you by FedEx on the behalf of the requestor noted above. FedEx does not validate the authenticity of the

EXHIBIT 7

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2/17/2009





## Medicare

March 4, 2008

Mr. Byron Gross  
Hooper, Lundy & Bookman, Inc.  
1875 Century Park East, Ste. 1600  
Los Angeles, CA 90067-2517

Refer to: Freedom of Information Request  
Case No.: 79228001083

Dear Mr. Gross:

This is in response to your Freedom of Information Act request dated February 13, 2009, for documents pertaining to wage index adjustments and reviews made by Mutual of Omaha/WPS of pension or post-retirement benefit costs for FFYs 2007 and 2008. After a careful search of our files, we could not locate records to satisfy your request. We regret that we have been unable to assist you at this time.

If you have reason to disagree with this decision, you may appeal. Your appeal should be mailed within 30 days of the date of this letter to:

The Deputy Administrator and Chief Operating Office  
Centers for Medicare and Medicaid Services  
Room C5-16-03  
7500 Security Boulevard  
Baltimore, MD 21244-1850

Please mark your envelope "Freedom of Information Act Appeal", and enclose a copy of this letter.

If you have any questions, please feel free to contact me at 866-734-9444, Ext. 8295.

Sincerely,

A handwritten signature in cursive script that reads "Mindy Chesnut".

Mindy Chesnut  
Supervisor, Cost Report Audit  
Medicare Audit & Reimbursement

ROBERT W. LUNDY, JR.  
PATRIC HOOPER  
LLOYD A. BOOKMAN  
W. BRADLEY TULLY  
JOHN R. HELLOW  
LAURENCE D. GETZOFF  
JAY N. HARTZ  
BYRON J. GROSS  
DAVID P. HENNINGER  
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ABIGAIL H. WONG  
SALVATORE J. ZIMMITTI  
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PAUL A. DEERINGER  
JONATHAN W. RADKE  
TRACY A. JESSNER

OFFICES ALSO LOCATED IN  
SAN DIEGO  
SAN FRANCISCO

March 18, 2009

WRITER'S DIRECT DIAL NUMBER:  
(310) 551-8125

WRITER'S E-MAIL ADDRESS:  
BGROSS@HEALTH-LAW.COM

VIA FEDERAL EXPRESS

FILE NO. 91075-901, 91075-927

Stacey Hayes  
Specialist Cost Report Appeals  
Wisconsin Physicians Service  
3333 Farnam Street  
Omaha, NE 68131

Terry Gouger  
Supervisor, Cost Report Appeals  
Wisconsin Physicians Service  
3333 Farnam Street  
Omaha, NE 68131

Mindy Chesnut  
Cost Report Audit Supervisor  
Wisconsin Physicians Service  
3333 Farnam Street  
Omaha, NE 68131

Re: CHS 2007 Wage Index (Pension Cost) Group Appeal  
PRRB Case No. 07-2462G

FREEDOM OF INFORMATION ACT REQUEST

Dear Ms. Hayes & Mr. Gouger:

Pursuant to our conversation with Terry and Stacey on March 18, 2009, this letter serves as a Freedom of Information Act ("FOIA") request for documents on behalf of the above-listed providers (the "Providers") in the above group appeal.

As you are aware, this group appeal pertains to the auditing of pension and post-retirement cost benefits for hospital cost reporting periods ("CRP") ending in 2003 to 2005 for purposes of calculating the federal fiscal years ("FFY") 2007 and 2008 wage indices. The Providers contend, among other arguments, that fiscal intermediaries were not auditing these costs consistently throughout the country.

As part of its discovery on this issue, on February 1, 2008, the Providers served a Request for Production of Documents upon Wisconsin Physicians Services ("WPS"). Because

EXHIBIT 9

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March 18, 2009  
Page 2

the Providers' request pertained to all hospitals for which Mutual of Omaha/WPS audited for the FFYs 2007 and 2008 wage indices, the Providers specifically requested pension audit data for all hospitals for which it served as a fiscal intermediary during the time. In order to reduce any burden on WPS, the Providers agreed with Mr. Gouger to narrow its request to a sample of 12 hospitals (without waiving their right to pursue wider discovery at a later date). *See* Sample List of WPS Hospitals, Ex. A.

Accordingly, pursuant to FOIA (5 U.S.C. § 552(a) and the relevant implementing regulations set forth at Title 42 of the Code of Federal Regulations ("C.F.R."), sections 401 *et seq.*, and Title 45 C.F.R. § 5.1 *et seq.*), the Providers hereby formally request that WPS send the following information for each of the 12 hospitals listed in Exhibit A:

- All wage-related cost report workpapers for the CRPs ending in 2003 to 2005 (as noted on Exhibit A) for purposes of the wage index reviews for FFYs 2007 and 2008; and
- CMS Form 339, in its entirety with all exhibits, for the CRPs ending in 2003 to 2005 (as noted on Exhibit A).

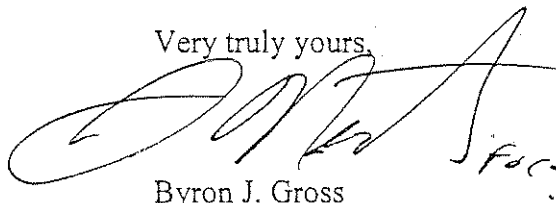
Please note that WPS is required to respond to our request within 20 days. *See* 5 U.S.C. § 552(a)(6)(A)(i). If these requests cannot be answered simultaneously, please respond to each request separately, as soon as you retrieve responsive documents. We can submit our requests separately, if necessary.

We are willing to pay fees for this request up to a maximum of \$250 without any further approval. If you estimate that the fees will exceed this amount, please notify us immediately.

Finally, please note that this FOIA request in no way waives the Providers' right to discovery in this appeal, including its right to compel answers to its February 1, 2008 document request.

Thank you very much for your prompt attention to this matter. We look forward to working with you.

Very truly yours,



Byron J. Gross

Encl.

cc: Jon P. Neustadter, Esq.

EXHIBIT 9

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**EXHIBIT A****LIST OF SAMPLE WPS HOSPITALS FOR WAGE INDEX CASES**

| Prov No | Fiscal Years Ended        | Prov Name                                | City              | County        | State | CBSA                               |
|---------|---------------------------|--|-------------------|---------------|-------|------------------------------------|
| 260068  | 12/31/2003,<br>12/31/2004 | Boone Hospital Center                    | Columbia          | Boone         | MO    | Columbia, MO                       |
| 450096  | 6/30/2004,<br>6/30/2005   | Christus St. Mary Hospital               | Port Arthur       | Jefferson     | TX    | Beaumont-<br>Port Arthur,<br>TX    |
| 390111  | 6/30/2004,<br>6/30/2005   | Hospital University of<br>Pennsylvania   | Philadelphia      | Philadelphia  | PA    | Philadelphia,<br>PA                |
| 160047  | 12/31/2003,<br>12/31/2004 | Jennie Edmundson Hospital                | Council<br>Bluffs | Pottawattamie | IA    | Omaha-<br>Council Bluffs,<br>NE-IA |
| 370093  | 8/31/2004,<br>8/31/2005   | Oklahoma University Medical<br>Center    | Oklahoma<br>City  | Oklahoma      | OK    | Oklahoma<br>City, OK               |
| 390223  | 6/30/2004,<br>6/30/2005   | Presbyterian Medical Center              | Philadelphia      | Philadelphia  | PA    | Philadelphia,<br>PA                |
| 280020  | 6/30/2004,<br>6/30/2005   | St. Elizabeth Regional Medical<br>Center | Lincoln           | Lancaster     | NE    | Lincoln, NE                        |
| 260138  | 12/31/2003,<br>12/31/2004 | St. Luke's Hospital of Kansas<br>City    | Kansas City       | Jackson       | MO    | Kansas City,<br>MO-KS              |
| 260179  | 6/30/2004,<br>6/30/2005   | St. Luke's Hospital                      | Chesterfield      | St. Louis     | MO    | St. Louis, MO-<br>IL               |
| 260193  | 6/30/2004,<br>6/30/2005   | St. Mary's Medical Center                | Blue Springs      | Jackson       | MO    | Kansas City,<br>MO-KS              |
| 390174  | 6/30/2004,<br>6/30/2005   | Thomas Jefferson University<br>Hospital  | Philadelphia      | Philadelphia  | PA    | Philadelphia,<br>PA                |
| 290007  | 6/30/2004,<br>6/30/2005   | University Medical Center                | Las Vegas         | Clark         | NV    | Las Vegas-<br>Paradise, NV         |



## Medicare

April 3, 2009

Mr. Byron Gross  
Hooper, Lundy & Bookman, Inc.  
1875 Century Park East, Ste. 1600  
Los Angeles, CA 90067-2517

Refer to: Freedom of Information Request  
Case No.: 7922800288

Dear Mr. Gross:

This acknowledges receipt of your Freedom of Information Act (FOIA) request dated March 18, 2009 for wage-related cost workpapers for various Medicare providers. We are advising you that the records responsive to your request are not within our authority to release. Therefore, we have forwarded those records and a copy of your request to:

Anita Groves, FOIA Coordinator  
Centers for Medicare and Medicaid Services  
Region VII, Federal Office Building  
601 East 12<sup>th</sup> St., Room 235  
Kansas City, MO 64106  
Phone #: (816) 426-6549

If you want information regarding the status of your request, you may write or phone the above referenced official.

Sincerely,

A handwritten signature in cursive script that reads "Mindy Chesnut".

Mindy Chesnut  
Supervisor, Cost Report Audit  
Medicare Audit & Reimbursement

cc: CMS – Kansas City Regional Office

DEPARTMENT OF HEALTH & HUMAN SERVICES  
Centers for Medicare & Medicaid Services  
601 East 12<sup>th</sup> Street, Suite 235  
Kansas City, Missouri 64106



**Office of the Regional Administrator**

---

April 9, 2009

Hooper, Lundy & Bookman, Inc.  
Attention: Byron Gross  
1875 Century Park East, Suite 1600  
Los Angeles, CA 90067-2517

Dear Mr. Gross:

This letter is in reference to your April 3, 2009, Freedom of Information Act (FOIA) request to Wisconsin Physicians Service Insurance Corporation in which you seek certain wage-related cost report work papers, CMS Form 339 and other information for cost reporting periods ending in 2003 to 2005.

Please be advised that the records responsive to your request are not within this Region's authority to release. Therefore, we have forwarded your request to the official listed below:

Michael S. Marquis  
Director, Freedom of Information Group  
Centers for Medicare & Medicaid Services  
Room N2-20-16  
7500 Security Boulevard  
Baltimore, MD 21244-1850  
Phone: (410) 786-5353

If you want information regarding the status of your request, you may write or phone the cited individual.

Sincerely yours,

Anita M. Groves  
Freedom of Information Coordinator  
Kansas City Regional Office



**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1875 Century Park East, Suite 1600, Los Angeles, California 90067-2517.

On July 10, 2009, I served the following document(s) described as **COMPLAINT FOR INJUNCTIVE RELIEF** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

Eric Holder  
United States Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Kathleen Sibelius, Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue, S.W.  
Washington, D.C. 20201

Thomas P. O'Brien, AUSA  
1200 U.S. Courthouse  
312 North Spring Street  
Los Angeles, CA 90012

Charlene Frizzera, Acting Administrator  
Centers for Medicare and Medicaid Services  
Office of the Administrator  
Hubert H. Humphrey Building  
200 Independence Avenue, S.W., Rm. 314G  
Washington, DC 20201

Jacqueline Vaughn  
Centers for Medicare and Medicaid  
Services  
Department of Health and Human  
Services  
7500 Security Boulevard, C3-01-20  
Baltimore, MD 21244-1850

**BY CERTIFIED MAIL:** I am "readily familiar" with Hooper, Lundy & Bookman's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelope(s) were placed for collection and mailing with postage thereon fully prepaid, Certified Mail – Return Receipt Requested, at Los Angeles, California, on that same day following ordinary business practices.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on July 10, 2009, at Los Angeles, California.

  
Elaine Rockett